

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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Amendment to the Commission's)	WT Docket No. 95-157
Rules Regarding a Plan for Sharing)	RM-8643
the Costs of Microwave Relocation)	

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COMMENTS OF UTAM, INC.

UTAM, Inc. hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking concerning microwave relocation cost sharing and the ground rules for the transition of 1850 - 1990 MHz from microwave operations to Personal Communications Services ("PCS").¹ As detailed below, UTAM supports the adoption of the PCIA cost sharing plan conditioned upon appropriate clarifications to adapt PCIA's underlying principles to address and meet the unique needs of unlicensed PCS. UTAM also generally supports the Notice's proposals to eliminate current abuses of the microwave relocation rules. However, UTAM firmly believes that such rule revisions should include a complete freeze prohibiting any further licensing on either a primary or secondary basis of new microwave facilities in the PCS spectrum.

I. INTRODUCTION AND SUMMARY

As the frequency coordinator for the unlicensed PCS spectrum, UTAM is responsible for financing and managing the relocation of the microwave links currently

¹ Notice of Proposed Rulemaking, WT Docket No. 95-157 (Oct. 12, 1995)(hereinafter "Notice").

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operating in the unlicensed band. Unlike licensed PCS systems which can be deployed to at least some extent prior to the relocation of microwave incumbents, many unlicensed systems and devices, such as nomadic products, cannot be deployed at all until there is significant or even complete clearing of the unlicensed spectrum. The cost sharing plan proposed by the Commission will facilitate the relocation process and ensure an equitable distribution of relocation costs.

Under the current rules, there is no assurance that the party first relocating a link will ever receive a contribution to the relocation costs from the other industry beneficiaries. A mechanism to facilitate and enforce the sharing of these substantial expenses would benefit the PCS industry as a whole. Moreover, microwave licensees will benefit because there will be a mechanism for cooperation by PCS licensees and UTAM to coordinate relocations of microwave systems which fall in more than one license area or spectrum band. In many cases, this will allow microwave licensees to negotiate with one party regarding the relocation of its links, rather than having to negotiate with the several PCS interests affected.

UTAM believes that the PCIA cost sharing plan provides a sound basis for ensuring industry-wide cost sharing. Unlicensed PCS can and will participate in this process. However, a few clarifications of the PCIA proposal are necessary to adapt the licensed PCS approach to the unique unlicensed PCS context. As a non-profit frequency coordinator, UTAM must be assured of the ability to control when and if the organization will assume specific financial liabilities. Concomitantly, UTAM should

contribute to relocation expenses when and if unlicensed PCS products benefit from a relocation. To best meet these objectives, UTAM believes that its cost sharing obligations should be triggered when a county is cleared of microwave links in the unlicensed PCS allocation and either UTAM raises a county's Zone 1 power cap which could not otherwise have been raised without microwave relocation activities by a third party or UTAM reclassifies a Zone 2 county to Zone 1 status which could not otherwise have been done without microwave relocation activities by a third party. UTAM also believes that it needs additional flexibility in its payment terms so that it can be assured of the ability to meet its obligations.

UTAM generally supports other aspects of the Notice that attempt to prevent abuses of the relocation process. However, UTAM believes that it is critically important that there be no additional secondary licensing in the 2 GHz band since these operations will inevitably require termination to allow full deployment of unlicensed PCS, including nomadic devices. The other proposed clarifications will assist UTAM and microwave incumbents in their relocation negotiations. In particular, a more precise definition of good faith bargaining and comparable facilities will give parties a basis around which to form an agreement. UTAM also welcomes the FCC's statement that legal and consulting fees and upgraded equipment are not included within the concept of a comparable system.

The prospect of increasing the speed of relocations by removing disincentives to early action and simplifying negotiations will enable PCS licensees and manufacturers

to bring the benefits of licensed and unlicensed PCS to the public as soon as possible. Thus, UTAM supports the adoption of a cost sharing mechanism that will expedite the relocation of microwave incumbents and relocation rules that will facilitate the negotiation process and clearly define PCS providers' responsibilities.

II. UTAM SUPPORTS THE ADOPTION OF A COST SHARING MECHANISM WITH CERTAIN CLARIFICATIONS TO TAKE INTO ACCOUNT THE UNIQUE CHARACTERISTICS OF UNLICENSED PCS AND UTAM

The cost sharing plan proposed by the FCC is structured to allow an equitable allocation of microwave relocation costs among benefitting PCS providers. UTAM believes that unlicensed PCS should pay its fair share of relocation costs incurred by PCS licensees and that PCS licensees similarly should pay their share of costs incurred by UTAM. In such respects, the PCIA consensus proposal was designed for licensed PCS and, not surprisingly, fails to account for several important characteristics unique to unlicensed PCS. First of all, UTAM cannot commit to financial obligations unless and until revenues from product sales are in-hand. Accordingly, the triggering of liabilities cannot arise involuntarily and must afford meaningful clearing fee opportunities for UTAM. UTAM sets forth below a review of the appropriate process and standards for creating UTAM cost sharing obligations.

A. UTAM Supports the Use of the Formula Proposed by the FCC for Computing a PCS Provider's Shared Costs Subject to Several Important Clarifications to Address the Unique Nature of Unlicensed PCS

UTAM generally supports the use of the cost sharing formula proposed by the FCC.² This formula provides a mechanism for adjusting the portion of relocation costs a PCS provider pays according to the advantage it receives from the relocation so that those PCS providers that benefit from an early relocation will pay an appropriately larger share of the relocation costs than those providers who benefit from the relocation only at a later time. UTAM believes that the FCC's proposed formula reasonably accounts for this distinction.

1. UTAM Must Be Able to Control When its Cost Sharing Liability Arises and Ensure That It Incurs Liabilities Only When Meaningful Benefits From the Relocation Occur

UTAM supports the FCC's conclusion that a PCS licensee should be required to pay amounts due under the cost sharing formula at the time that its operations would have caused interference with the relocated link had that link not previously been relocated.³ This principle accurately reflects the time that a PCS licensee benefits from the relocation. The FCC's Notice, however, fails to recognize that licensed and unlicensed PCS have significant differences which must be taken into account in

² Notice, ¶ 29.

³ Id., 21 ¶ 54.

determining when unlicensed PCS operations will benefit from a relocation and should thus incur cost sharing liability.

UTAM understands that PCIA and the larger A and B block auction winners will be submitting comments on various approaches for defining when liability is incurred for licensed PCS. With respect to unlicensed PCS, UTAM believes that the FCC's cost sharing rules should specify that cost sharing obligations will arise when:

- a county is cleared of microwave links in the unlicensed allocation and UTAM raises a Zone 1 power cap as a result of third party relocation activities or
- a county is cleared of microwave links in the unlicensed allocation and UTAM reclassifies a Zone 2 county to Zone 1 status which could not have been done without third party relocation activities.

This "trigger" mechanism ties the incurring of cost sharing obligations by UTAM to the time at which unlicensed device manufacturers will benefit from increased deployment in a county because of microwave relocations. Structuring UTAM's obligations in this way will allow UTAM to control when it incurs a cost sharing obligation by capping or restricting deployment in each county until sufficient funds have been collected to make the cost sharing payments.

Prior to completely clearing the unlicensed PCS sub-band, UTAM is strictly controlling product entry into the market to ensure non-interference. As detailed in the UTAM Plan for Financing and Managing 2 GHz Microwave Relocation, the type of coordination required and the number of devices that can be deployed without

interference to microwave incumbents will differ in each county and each sub-band.⁴ For the asynchronous and the isochronous sub-bands, all counties will be divided into two groups. Zone 1 counties, those distant from existing microwave operations, will be pre-coordinated and the maximum deployable power will be calculated based on TIA Bulletin 10F (and subsequent releases) standards. UTAM will aggregate the power of the unlicensed devices as they are installed and activated consistent with the UTAM Location Verification Process (LVP) to ensure that the maximum permitted power levels are not exceeded. Zone 2 counties, which have microwave receivers nearby or in the county, will require site-specific coordination for all deployments.

Because UTAM will be collecting its revenue from a fee on each deployment of coordinatable devices, UTAM cannot predict with certainty how much revenue it will be receiving each year. It follows that, as this represents the sole source of the revenue available to UTAM to pay its cost sharing obligations, UTAM must be able to control when it incurs those obligations to ensure that it will have the funds available to make necessary payments. In its Plan, UTAM stated that it would not relocate any microwave incumbents until it had collected enough funds to complete each relocation it initiated.⁵ UTAM needs a similar level of assurance in connection with the cost sharing plan to guarantee that it will not be forced to take on cost sharing obligations

⁴ UTAM Plan for Financing and Managing 2 GHz Microwave Relocation, GEN Docket No. 90-314, at 60-64 (filed Aug. 1, 1994).

⁵ Id. at 46.

until it has the funds necessary to make the required payments. Coordinating UTAM's cost sharing obligations with the benefit unlicensed manufacturers will receive in increased deployment should give UTAM the security it needs.

2. To Ensure Timely Unlicensed PCS Deployment and UTAM's Ability to Meet its Cost Sharing Obligations, UTAM Must Be Able to Elect Either the FCC's Deferred Payment Option or Dedicate Clearing Fees to Fulfill Cost Sharing Obligations

The FCC has proposed that UTAM be permitted to pay its cost sharing obligations using installments, at an interest rate equal to that of ten-year U.S. Treasury obligations applicable on the date the license is granted.⁶ Payments would consist of interest only for the first six years, with principal and interest amortized over the next four years. However, because UTAM's revenues are so limited and difficult to predict, UTAM should be able to elect at its discretion between one of two options for each cost sharing obligation. First, UTAM could elect to pay an obligation using the payment terms the FCC has proposed. Alternatively, UTAM should be allowed to choose to dedicate the clearing fees raised from the additional deployment permitted as a result of the third party's relocation activities to pay its cost sharing obligation. UTAM believes that being able to choose between these options would be sufficient for it to meet its cost sharing obligations. If UTAM has sufficient funds in hand, it could commit to paying its obligations on the terms proposed by the FCC. However, if it does not have enough revenue to meet this schedule, UTAM should be able to pay its

⁶ Notice, ¶ 61.

obligations from the fees raised as a result of the relocation, which ties the benefit unlicensed manufacturers receive from the relocation to the rate at which the relocater receives its reimbursement.

B. A PCS Provider Should Be Entitled to 100% Reimbursement for Relocating Any Link Outside its Frequency Block

The FCC's cost sharing plan generally does not take account of adjacent channel interference in the calculation of cost sharing obligations. UTAM has consistently believed that consideration of adjacent channel benefits should be excluded to simplify the cost sharing mechanism. Interference from PCS operations to microwave incumbents in adjacent bands will occur in many cases. However, to include such calculations in the cost sharing mechanism will increase the complexity and expense of cost sharing without any concomitant benefits.

However, the FCC has proposed an exception to this basic rule and would require that when a PCS provider relocates a microwave link in an another band because of adjacent channel interference, it should receive cost sharing reimbursement as determined by the formula rather than 100% reimbursement.⁷ UTAM believes that the FCC should not differentiate between out-of-band relocations that are done because of adjacent channel interference and those done for other reasons, such as because the link is part of a larger network the PCS provider is relocating. Requiring 100% reimbursement to a PCS provider who relocates links outside its license band is a

⁷ Id., ¶ 33-34.

simple, easy rule to apply. PCS providers will be relocating links outside their license blocks not only because of adjacent channel interference, but also because the cost sharing rules provide an incentive to negotiate the relocation of entire microwave networks. To require that the relocators prove why an out-of-band link is relocated will complicate the clearinghouse's tasks while potentially increasing disputes among PCS providers. In this case, a clear-cut rule for out-of-band relocations will benefit all parties in the long run.

C. Premiums Above the Actual Cost of Relocation Should Not Be Included in the Costs Eligible for Reimbursement

PCS providers who choose to pay an incumbent a premium in excess of actual relocation costs in order to assure an early relocation should not be able to pass those costs on to other PCS and unlicensed PCS providers who played no part in negotiating the agreement.⁸ A relocater that chooses to pay an incumbent such a premium for early relocation presumably benefits to that extent. However, there can be no justification for imposing that voluntarily incurred obligation on other PCS providers who did not require or necessarily benefit from the early relocation.

UTAM, in particular, cannot afford and does not intend to pay premiums over the actual costs of relocation to microwave incumbents. UTAM has limited funding available and has based its financing plan for the clearing of the unlicensed band on actual relocation costs for those links. If UTAM were forced to contribute to

⁸ Notice, ¶ 37.

premiums PCS licensees may negotiate, UTAM's ability to finance the clearing of the unlicensed spectrum would be jeopardized.

D. Reimbursable Costs Must Be Capped

UTAM supports the FCC's proposed cap on reimbursable costs of \$250,000 per link plus \$150,000 for any new towers needed.⁹ A cap is critical to ensuring that PCS providers are responsible in controlling relocation costs and that later market entrants are not burdened with unreasonably high payments as a result of negotiations in which they did not participate. The cap also allows UTAM and entrepreneur block licensees' to calculate in advance their maximum potential cost sharing liabilities. Although UTAM's own research (and that done by the FCC's Office of Engineering and Technology) estimates that the average cost for relocating a link will be lower than \$250,000 (including any new towers required),¹⁰ UTAM does not object to the proposed higher limits, which will allow the additional costs of more expensive relocations to be allocated among the benefitting parties.

E. Cost Sharing Should Be Limited to Ten Years

UTAM believes that the cost sharing plan should end for all PCS providers ten years after the date that the voluntary negotiation period commenced for A and B block

⁹ Notice, ¶ 43.

¹⁰ See Creating New Technology Bands For Emerging Telecommunications Technology, Office of Engineering and Technology, OET/TS 91-1, at 31-35 (Dec. 1991) (Report filed in ET Docket 92-9).

licensees, April 4, 2005.¹¹ No additional cost sharing obligations should be incurred after this date. By that time, most PCS licensees and UTAM will have completed their relocation activities. Limiting the duration of a program in this manner ensures that it will not outlive its usefulness and cause administrative burdens in excess of its benefits.

F. Parties Should Attempt To Resolve Disputes Through ADR Procedures

UTAM supports the FCC's tentative conclusion that disputes arising out of implementation of the cost sharing plan should be resolved through alternative dispute resolution procedures.¹² UTAM anticipates that the majority of disputes during the one-year mandatory negotiation period will be resolvable. Requiring parties to submit independent appraisals of valuations to the clearinghouse at the time the parties utilize the ADR procedures will reduce the number of difficulties. Moreover, requiring that parties seek appraisals from independent sources will give a basis for negotiated settlements based on actual relocation costs.

G. Private Agreements Between PCS Providers Should Supersede the Cost Sharing Rules

In some cases, PCS providers may negotiate agreements for sharing relocation costs among themselves which differ from the FCC's cost sharing plan. Such agreements should be encouraged, as they will likely further facilitate the clearing of the PCS spectrum. The payments required by these agreements should supersede any

¹¹ Notice, ¶ 39.

¹² Id., ¶ 67.

obligations incurred among the contracting parties under the cost sharing rules.

However, any party to a separate agreement would still be liable to other PCS providers for any obligations incurred under the FCC's cost sharing plan.

III. UTAM SUPPORTS THE FCC'S PROPOSED CLARIFICATIONS TO THE MICROWAVE RELOCATION TRANSITION RULES BUT STRONGLY OPPOSES ANY CONTINUED PRIMARY OR SECONDARY LICENSING OF MICROWAVE LINKS IN THE PCS BAND

In general, the FCC's proposals will better define PCS providers' and microwave incumbents' obligations to facilitate the relocation process. Clarification of a PCS provider's responsibilities to an incumbent will encourage negotiating parties to reach an agreement which will lead to expedited clearing of the band. However, the FCC must rethink its proposal to continue secondary licensing of microwave incumbents. This will slow PCS deployment and create the very types of controversy that the Commission's other proposals are designed to eliminate. Moreover, microwave incumbents may argue under Section 309 of the Communications Act that they cannot be easily and immediately shut down.

A. There Should Be No Additional Secondary Licensing in the PCS Band

Although UTAM supports the FCC's conclusion that further primary licensing of microwave operations in the 2 GHz band should be terminated now that relocations have begun,¹³ UTAM continues to believe that additional secondary licensing will

¹³ Notice, ¶ 89.

cause future difficulties and should likewise also be terminated. Secondary licensees will inevitably suffer interference from and cause interference to continually expanding PCS operations. If new secondary licensees are allowed to begin operations, they will waste money constructing facilities that will have to be shut down. Accordingly, UTAM strongly urges that all future microwave activity should be directed to the other bands the FCC has designated for such operations, such as 4, 6 or 11 GHz.

B. Offer and Acceptance of a Comparable System Should Define Good Faith Negotiations

UTAM strongly supports the FCC's tentative conclusion that good faith bargaining consists of an offer by a PCS licensee to replace a microwave incumbent's system with comparable facilities and an incumbent's acceptance of that offer.¹⁴ If an incumbent fails to accept an offer of comparable facilities, this should create a rebuttable presumption that the incumbent is not acting in good faith. UTAM feels that this establishes appropriate guidelines for both microwave incumbents and PCS providers since an incumbent is entitled to a comparable system during the mandatory negotiation period. An incumbent that does not bargain in good faith during the mandatory negotiation period should lose its right to a comparable system and its system should be reclassified to secondary status six months after the determination. The threat of this penalty will ensure that incumbents will negotiate in good faith and not unreasonably delay the relocation process.

¹⁴ Id., ¶ 69.

C. The FCC's Proposals Properly Define Comparable Facilities

To avoid any disputes between PCS providers and microwave incumbents, the FCC should rely on, and encourage negotiating parties to rely on, technical factors to determine comparability. Determining comparability based on technical factors which easily can be measured will minimize disputes between PCS providers and incumbents.¹⁵ If the new system is found to have similar communications throughput, system reliability, and operating cost, the incumbent will receive a system which performs as well as or better than its current system.

UTAM also supports the FCC's conclusion that a replacement facility will be presumed comparable if the new system's communications throughput and reliability are equal to or greater than that of the system to be replaced and the operating costs of the replacement system are equal to or less than those of the existing system. The FCC's proposal to consider facilities comparable in cases where the specific increased costs associated with the replacement facilities are paid by the party relocating the facility or the existing microwave operator is fully compensated for those increased costs, subject to the qualification that reimbursement for increased recurring costs be limited to a single ten-year license term, further helps define the parties' positions.¹⁶

UTAM also strongly supports the FCC's tentative conclusion that comparable facilities be limited to the actual costs associated with providing a replacement system

¹⁵ Notice, ¶¶ 72-73.

¹⁶ Notice, ¶ 74.

and that extraneous expenses, such as fees for attorneys and consultants that are hired by the incumbent without the advance approval of the PCS relocater, are not reimbursable during the mandatory negotiation period.¹⁷ UTAM is committed to providing all incumbents that it relocates with a comparable system. However, as explained above, UTAM is not prepared and does not have the funds to pay fees for attorneys and consultants unnecessary to the relocation process.

UTAM welcomes the clarification that PCS providers are not required to replace existing analog equipment with digital equipment when an acceptable analog solution exists.¹⁸ Incumbents who would like to obtain an upgraded system that exceeds the parameters of their current system should bear the additional costs. If the incumbent chooses to upgrade its system, it is entitled to receive the costs of a comparable system and then should bear full responsibility for the installation and functioning of the new system.¹⁹ In addition, UTAM believes that allowing parties to "trade-off" system parameters will infuse additional flexibility into relocation negotiations and permit an incumbent to receive a comparable system at the lowest possible cost to the relocater.²⁰

¹⁷ Id., ¶ 76.

¹⁸ Id., ¶ 77.

¹⁹ If the incumbent chooses to build its own system, it should not be entitled to the FCC's twelve-month test period for that system. Rather, the terms of the relocation agreement negotiated with the PCS provider should determine the relocation and testing periods. See Section III.E.

²⁰ Notice, ¶ 75.

UTAM agrees with the Commission's construction of its rules to the effect that a PCS provider may voluntarily undertake to relocate entire microwave systems that include non-interfering links outside its service area but that this is not required.²¹ UTAM is aware that the relocation of microwave networks as a whole is important to many incumbents, and UTAM has pledged to work with incumbents to try and accommodate their needs to the extent possible. However, the FCC's clarification will make it clear that PCS providers are only required to relocate links that will suffer interference from PCS operations.

Further, to encourage voluntary agreements, the FCC has proposed that parties unable to reach a compensation agreement six months into the mandatory negotiation period should be required to obtain at least one independent cost estimate.²² UTAM supports this concept and believes that having an independent party prepare an estimate will give the PCS provider and the incumbent an unbiased basis upon which to negotiate an agreement.

**D. Public Safety Licensees Should Be Required
To Provide Proof of Their Status**

UTAM supports the FCC's proposed procedures for identifying public safety licensees entitled to extended negotiation periods.²³ Requiring that those licensees produce proof of their status to a PCS provider will ensure that only those entitled to

²¹ Id., ¶ 76.

²² Id., ¶ 78.

²³ Notice, ¶¶ 80-81.

extended negotiation periods are afforded that advantage. Because many unlicensed PCS products cannot be deployed until the spectrum is completely cleared, UTAM is particularly concerned about the extended relocation periods granted to public safety licensees. Therefore, UTAM strongly supports strict adherence to the FCC's definition of public safety and no expansion of the category of incumbents entitled to public safety status.

E. The Requirements of the Twelve-Month Test Period Must Be Clarified

In order not to delay microwave relocations, the FCC must further define the limits of the twelve-month test period. UTAM agrees that the test period should run from the time the microwave licensee commences operations on its new system.²⁴ After operations have begun on the new system, the incumbent should be required to surrender its authorization to the Commission which should hold it until the end of the test period. At that time, the FCC should make an announcement that the link has been successfully relocated.

Because some incumbents will prefer to build their own system rather than have the PCS provider complete it, the FCC should clarify that incumbents who choose to accept a payment from a PCS provider and then engineer the relocation of their own system are not entitled to the twelve-month test period. If an incumbent designs and constructs its own relocated system, the PCS provider should not be responsible for

²⁴ Id., ¶¶ 84-85.

remedying any difficulties with the new system since it will have exercised no control over its implementation. Any test period for an incumbent that chooses to relocate its own system should be determined in the agreement between the incumbent and the PCS provider. Microwave incumbents should also be allowed to waive the test period by contract with a PCS provider.

F. All Primary Microwave Operations Should Be Relegated To Secondary Status as of April 4, 2005

UTAM strongly supports the FCC's tentative conclusion that microwave incumbents still operating in the 1850 - 1990 MHz band on April 4, 2005 should be made secondary on that date.²⁵ In order to have full deployment of unlicensed PCS devices, particularly nomadic devices, the entire unlicensed spectrum band must be cleared of all licensees. Ten years is ample time for the necessary relocations to take place, particularly once a cost sharing plan is implemented.

IV. CONCLUSION

The FCC's proposed cost sharing plan and relocation rule modifications will facilitate the relocation process and thus expedite the delivery of licensed and unlicensed PCS services to the public. However, in developing its rules, the FCC must take into account the unique nature of unlicensed PCS and the difficulties faced by UTAM. Because the full deployment of unlicensed PCS systems and devices requires

²⁵ Notice, ¶ 90.

clear spectrum, UTAM urges the FCC to adopt the proposals in the Notice, but with the modifications described herein.

Respectfully submitted,

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